



BASIC PRINCIPLES OF ADVOCACY:

I. INTRODUCTION

This article discusses certain basic principles of advocacy that one can and should use in most types of trials. The article lists 18 principles and suggests that each should be applied to some degree in any given case to assure the most effective presentation. The principles are rules, not meant to be blindly followed, since trial practice requires too much flexibility and instantaneous adjustment for anyone to succeed by rigid application of rules.

Others may suggest additional or different rules than those stated in this article. Such a debate would be healthy for it would increase the analysis of what makes a good trial and appellate lawyer.

The principles are drawn from historical works, the author's observations in teaching beginning trial lawyers, discussions with many experienced trial lawyers and personal trial experience.

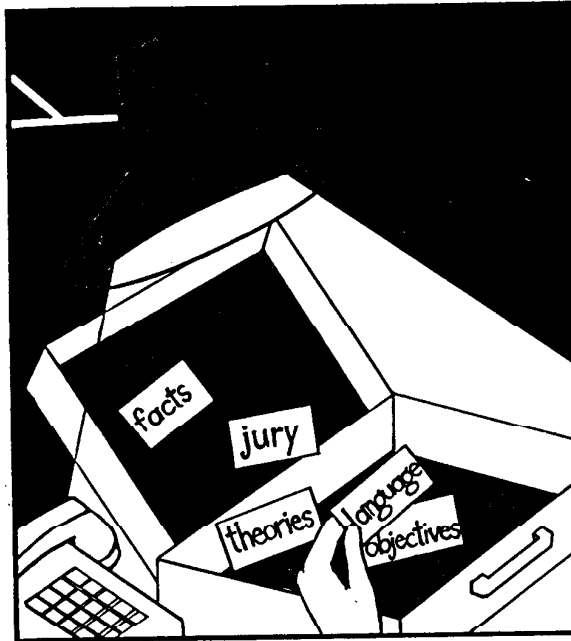
II. PRETRIAL PRINCIPLES

PRINCIPLE NO. 1 —

PREPARE

It is doubtful that any book on advocacy or trial techniques can be examined without finding an adamant statement about the need for preparation. While advocates are agreed that preparation is essential, it is harder to determine, particularly for the beginner, exactly what preparation means. Rufus Choate, second only to Daniel Webster as a trial and appellate advocate in the mid 1800's once said that, "In determining the theory of the case, I am never satisfied until I have met every supposition that could be brought against it."¹ Lord Russell, the English

advocate,² thought it essential when dealing with complicated facts to arrange the narrative of events in the order of date. In addition, Russell claimed that he never worried about the case law until he mastered all the facts. Finally, Russell concentrated, as most great advocates do, on the weaker points of his case and how to overcome them. Whatever techniques may be used, preparation is the first and most important principle of advocacy and may overcome other shortcomings. By preparation of the advocate I mean thorough examination of each strength and weakness, each fact, each principle of law, each witness, each document, uninterrupted analysis of the consistencies and inconsistencies in the case, ability to focus on the weak parts of the case and determine how they will be met. It is complete absorption, total immersion in the case so that one's response at the time of trial can be instantaneous.



ART: Katie Brennan © 1985

ONE TRIAL LAWYER'S VIEW

by James J. Brosnahan

PRINCIPLE NO. 2 —

UNDERSTAND FULLY THE SOCIAL SETTING IN WHICH THE CASE IS TRIED

Cicero said it first and best.³ No case is tried in a social vacuum. The advocate must be informed about social currents and local mores and values. Examine, for example, recent developments in medical malpractice cases. For many years it was difficult for a plaintiff successfully to sue a doctor for malpractice. The public's image of the doctor made it difficult for a jury to come to the view that a doctor should be held to pay damages. With the deterioration of that respect, in certain urban areas it became possible to obtain large awards. Then, as public debate grew about the inability of doctors to obtain medical malpractice insurance, the pendulum shifted again. Each witness, each theory, indeed each question posed to a witness, is framed on a social background that the advocate must understand and utilize to his or her advantage.

PRINCIPLE NO. 3 —

KNOW YOUR ADVERSARY

This simple admonition is ignored too often. Each advocate has strengths and weaknesses. If counsel has never faced this particular adversary, others have and they can be consulted. Transcripts are sometimes available and can be consulted. It is essential to know the opponent's legal acumen, ethical attitudes, charm to the jury, relationship with the judge and persuasive ability.

PRINCIPLE NO. 4 —

UNDERSTAND THE LEGAL FRAMEWORK OF THE CASE

Total preparation of facts is never possible because facts change and flow as people's recollections change and flow. But the law can be mastered in advance. Each step in the trial should

Continued on page 7

Inside This Issue

New Evidence Tapes	3
NITA In-House Program	3
Professional Trial Consultant	5
Alumni News	16

VIEW continued from page 1

be made with a conscious awareness of legal principles. Juries will be called upon to apply the facts to the law. It is my own observation that they are very conscientious in applying legal principles to the facts. The melding of law and facts is the primary job of the advocate.

PRINCIPLE NO. 5 —

DEVELOP A CONSISTENT AND COMPREHENSIVE THEORY OF WHAT YOU WANT TO PROVE

Any case is a series of assertions and counter-assertions. Using the legal framework as a guide, the trial lawyer should carefully consider each aspect of the case and attempt to arrive at a comprehensive trial plan. This process helps to eliminate inconsistent positions where they can be eliminated.⁴

Development of a trial plan allows the trial lawyer to make sure he or she does not contest the uncontested and eliminate assertions not clearly provable. One of the most common problems for novice trial lawyers is to assert or imply the existence of a fact only to have its non-existence immediately and dramatically determined.

Because a trial, among other things, is a battle for the confidence of the decision maker, making assertions which turn out to be wrong can cost the advocate more than the alternative of ignoring the issue. The concept of having a trial plan is very old. Quintillian,⁵ the best known Roman advocacy teacher wrote, "Let our method of speaking be settled for no journey can be attempted before we know to what place and by what road we have to go."

You sometimes hear trial lawyers, particularly defense lawyers in criminal cases, say that development of a theory must await the presentation of the state's case. Actually what should be said is that alternate theories may be considered and will depend for their execution on the road ultimately taken by the prosecution or plaintiff.

III. TRIAL PRINCIPLES

PRINCIPLE NO. 6 —

OBTAIN AS MUCH INFORMATION AS POSSIBLE ABOUT THE DECISIONMAKER (JUDGE OR JURY) AND THEN TRY THE CASE WITH THAT INFORMATION IN MIND

People's judgments are colored, and very often determined by, their background and prior experience. It is essential that the advocate understand as much as possible about the decision-maker. Some advocates try a case in a vacuum, coming to their position as a

matter of their own logic and hoping that the decisionmaker will agree with them. But the world is filled with diverse people and while they can be moved they rarely can be moved long intellectual distances. Each argument in trial, each position taken, should be done with the decisionmaker in mind. Pretrial preparation of a case takes the trial lawyer to the point of the selection of the jury. Once the jury is selected the trial lawyer must determine what strategic changes should be made because of the type of jury that is now in the box. It is futile to try a case as though all minds, no matter what background, will be compelled by it. There has never been such a case.

Arguing to a judge in any court involves the identical principle. The advocate should know the background of the judge, what organizations he or she belonged to as a private lawyer before going on the bench, what his or her professional experience was and what attitudes the judge has manifested since going on the bench. Argument should then be shaped as much as possible to convince that particular judge (or judges). The principle applies in the United States Supreme Court. See, for example, an excellent analysis of the argument of Leonard Boudin in the Supreme Court in *Kent v. Dulles*, 357 U.S. 116, 78 Sup. Ct. 1113, 2 L.Ed.2d 1204, in which Mr. Boudin geared his argument to those qualities that he saw in Justice Frankfurter.⁶

The writer has seen so many examples of the application of this principle that I am convinced of its soundness. I once saw a lawyer argue to a jury composed primarily of men and women over the age of 55 that there would never be another depression because the government had passed a law against it. The lawyer was oblivious to the people hearing his argument. They knew, from experience, he was wrong and it hurt his case. The same principles affect whether counsel should cross-examine an expert on the amount of the fee the expert has received. Rather than there being an absolute answer to that question, it may well turn on the income level of the jury. A working class jury might be offended by the receipt of \$100 per hour by an expert, whereas a more affluent jury would not.

Although it is beyond the scope of this article to spell out the ways in which one determines the background of the judges and juries, in all jurisdictions it can and should be done.

Continued on page 9

NATIONAL INSTITUTE FOR TRIAL ADVOCACY*

COMPLETE EVIDENCE AUDIO TAPE PACKAGE

With Professors Irving Younger & Faust Rossi

NITA* has available a complete series of evidence lectures which is a must for every serious trial advocate. These cassette audiotapes can be played in your home, office or car. The fifteen tape, approximately fourteen hour package comes complete with a 200 page manual that outlines and supplements each tape presentation. The entire audio package is shipped in an attractive vinyl case and can be purchased for \$100 plus applicable shipping and handling. The lectures were delivered by Professor Irving Younger and Professor Faust Rossi. The entire series is also available in a variety of video formats.

Part	Series Title	Code #	Length
I	"Introduction to Evidence"	EY-1	(57 min.)
II	"Basic Concepts of Evidence"	EY-2	(51 min.)
III	"Failure of Recollection, Best Evidence Rule, Perception, Introduction to Expert Witnesses"	EY-3	(52 min.)
IV	"Expert Witnesses, Cross Examination & Impeachment I"	EY-4	(59 min.)
V	"Cross Examination & Impeachment II, Rehabilitation I"	EY-5	(59 min.)
VI	"Rehabilitation II, Character as a Defense"	EY-6	(27 min.)
VII	"Hearsay I"	EY-7	(24 min.)
VIII	"Hearsay II"	EY-8	(59 min.)
IX	"Hearsay III"	EY-9	(60 min.)
X	"Hearsay IV"	EY-10	(58 min.)
XI	"Burdens of Proof and Presumptions"	EY-11	(54 min.)
XII	"Hearsay and the Right to Confrontation I"	EY-12	(60 min.)
XIII	"Hearsay and the Right to Confrontation II"	EY-13	(59 min.)
XIV	"The Ten Commandments of Cross-Examination"	EY-14	(60 min.)
XV	"Hearsay Update"	EY-15	(60 min.)
	Complete Series	EY-S	
	Additional Outline Books	EY-O	

Name _____
Address _____
City _____ State _____ Zip _____
Phone () _____

Please send me the following listed tapes. Indicate individual tapes or complete series by code number, and specify format when ordering videotapes. All shipments via UPS unless otherwise specified.

AUDIO TAPES

___ \$100 (complete series)

___ \$15 (individual tape)

VIDEO TAPES

___ \$1000 (complete series)

___ \$140 (1 hr. tape)

___ \$100 (½ hr. tape)

Please indicate desired format:

☐ Betamax (½")

☐ VHS (½")

☐ Umatic (¾") ☐ ½" reel-to-reel

___ \$10 ADDITIONAL OUTLINE BOOKS

☐ Check Enclosed ☐ Visa ☐ Master Charge

Credit Card # _____ Expires _____

Signature _____

Send order to:

The National Institute for Trial Advocacy
1507 Energy Park Drive, St. Paul, MN 55108
(800) 328-4815, ext. 225
In Minnesota (800) 752-4249, ext. 225

SU4

VIEW continued from page 7

PRINCIPLE NO. 7 —

GIVE CAREFUL ATTENTION TO THE SEQUENCE OF PRESENTATION

Just as maximum emotional impact is achieved in a play by the imaginative plot development, so too in almost every aspect of the trial. For example, order of witnesses can very often increase anticipation and even lend an air of mystery where that is desired. A weak witness who must be called can sometimes be masked by surrounding that witness with strong witnesses. By carefully thinking through the presentation of witnesses, the entire atmosphere of the trial can be controlled.

There are times when a sudden change in the anticipated sequence can be a surprise to the other side and an advantage. Care must be taken never to make misleading statements to opposing counsel on any subject, including the order of witnesses. However, there are certain anticipated sequences. For example, in a criminal case very often the defendant will be one of the last witnesses. Some prosecutors may anticipate and expect it. A defense lawyer who puts on the defendant at an earlier time may find the prosecutor unprepared to cross-examine.

As the universe devolves from planets eventually into atoms, so a trial devolves into a series of questions to particular witnesses. Each series of questions should be carefully analyzed for proper sequence.

Finally, the order of argument must be given careful attention. Sometimes the impact of the opponent's argument made before you speak is so strong that you must immediately deal with the most outstanding questions presented by that argument before presenting your own argument as you planned.

PRINCIPLE NO. 8 —

USE LANGUAGE BEST SUITED TO THE DECISIONMAKER

"One has to be able to choose one's words well and arrange them cleverly," Cicero⁷ said when describing the essential tools that every advocate must possess. Quintillian commented on the need to use the language of the market place in appropriate situations when arguing to people who come from the market place. Rufus Choate was thought to have a tremendous vocabulary. Indeed the use of the right word at the right time in argument became a personal obsession with Choate, but accounted for what was described as his "full-worded" eloquent style.

Many verbal battles occur in trial, for example, the prosecutor refers to the "brutal murder" — the defense lawyer to the "unfortunate incident." Verbal battles are sufficiently important so that counsel should never allow the adversary to capture the terminology. However, the importance of language goes beyond mere terminology. The skilled advocate must consciously consider the choice of the most powerful, the most apt, the most convincing, the most appropriate, and sometimes the most mellifluous words to move a jury, or perhaps in a more subtle way, a judge.

PRINCIPLE NO. 9 —

FULLY DEVELOP ALL ESSENTIAL FACTS IN THE CASE

Unlike law school and bar examinations where the mere mention of an issue gives the student full credit, it is necessary at trial to build up and reinforce the proof of a fact. First, there is anticipation that the fact will eventually be established. Second, there is clarity of presentation to allow the finder of fact to understand the fact. Third, there can be reinforcement of the fact. Sometimes establishment of a fact can be accomplished when the other side is objecting and attempting to keep relevant evidence out. A jury's interest will be piqued by counsel's difficulties in getting evidence in as long as that evidence is eventually available for their consideration.

PRINCIPLE NO. 10 —

DEVELOP AN OBJECTION STRATEGY

A trial takes place on two levels. First there is the presentation of evidence for the purpose of persuading the finder of fact. Second and simultaneously is the recordation of events for purposes of appellate review. One of the most difficult trial tactical choices is presented by the fact that the law universally requires a clear objection if the issue is to be presented as an appellate point. Most experienced trial lawyers will state that juries do not like objections. Generally juries react unfavorably to the person objecting and the offending evidence very often is driven further into their minds by objections even when the objections are sustained and even when the judge admonishes the jury to disregard the evidence. Such a dilemma requires careful consideration to determine priorities. Which questions are worth preserving for appeal? At what points in the trial are offers of proof desirable and necessary?

The least attractive criterion for deciding when to object is simply to de-

termine when a violation of the rules of evidence has occurred. Beginning lawyers particularly fall into the bad habit, thinking that their function is to police the presentation of evidence, searching out any inadmissible matter. Although some cases call for a greater number of objections and emphasis on preserving the record, others can be tried with very few objections. The choice should be deliberate, not just reactive.

PRINCIPLE NO. 11 —

ADMIT THOSE MATTERS THAT WILL HURT YOUR POSITION IF THEY WILL EVENTUALLY BE PROVEN

There is something in the human psyche which loves a confession. Much can be forgiven if it is learned by an honest admission. It is the slow death of disclosure which can often prove the most fatal for the advocate. Fighting a proposition that will eventually be established undercuts the advocate's good will with the finder of fact and emphasizes the ultimately proven point. Where harmful evidence is admitted, counsel may argue, "We told you that. There is no question about it." By clearing some of this harmful underbrush, the advocate is free to fight the case on grounds where there is a contest. An interesting example of this principle occurred when Lord Erskine defended a man who had shot at the King in view of thousands of people. It was a capital offense calling for the defendant to be hanged, drawn and quartered. As the Crown's case was presented, Erskine sat quietly offering no cross-examination and no objections. When he got up to give his opening statement he said, "Of course the defendant had shot at the King, that there was no question about that, but he had done so because he lost his reason when fighting in a war waged in the name of the King." The result was the presentation of one of the earliest insanity defenses and one of the most successful.

PRINCIPLE NO. 12 —

ATTACK ONLY WHEN NECESSARY

If an effort was made to describe the advocate's most common flaw, over aggressiveness would certainly be at the top of anyone's list. Beginning lawyers sometimes attack anyone who offers evidence against their case. More often than not the witness although mistaken, may be well-meaning, and a jury appreciates the ability to show honest errors without needless bombastic attack.

Continued on page 11

VIEW *continued from page 9***PRINCIPLE NO. 13 —****CONDUCT DIRECT EXAMINATION SO THAT IT FLOWS IN A PERSUASIVE MANNER**

Like a play, the presentation of the direct examination should be coherent with as few interruptions as possible. If you were watching Richard III and a lawyer ran into the middle of the stage as Richard said, "Now is the winter of my discontent," and the intruder was shouting that the statement was not the best evidence of Richard's intent, it would disrupt the play. The same thing is true of trials, and the object in direct examination is to put question after question in an unobjectionable manner and thereby prevent disruption. If there are objections, the object is not to win the evidence point after long colloquy but rather to go on. Yielding to objections sometimes facilitates the presentation.

PRINCIPLE NO. 14 —**CONDUCT CROSS EXAMINATION TO DISPLAY INFORMATION, NOT TO ELICIT INFORMATION**

Among the rules of cross-examination you very often find the suggestion that the examiner should never ask a question to which he or she does not know the answer. Not just a rule to be applied from time to time, it

is an entire way of thinking about the process of cross-examination. Each question that is asked should have an answer known to the examiner or an answer that the examiner does not care is given. Only in limited and exigent circumstances may questions be asked when the answer is unknown. This principle is easier to apply in today's system of expanded criminal and civil discovery.

PRINCIPLE NO. 15 —**DEVELOP A THEORY OF ARGUMENT**

The advocate must have a theory of argument. Although some formal approaches to a theory of argument are discussed below, most arguments are instinctive in nature. But instinctive or formal, an argument must contain a well-reasoned and logical theory. In his *Rhetoric and Poetics*, Aristotle⁸ listed some 25 different types of arguments that can be made. It would be hard to think of a type of argument that Aristotle did not discuss in some way. For example, Aristotle's argument No. 25 is "to consider whether the accused person can take or could have taken a better course than that which he is recommending or taking or has taken. If he has not taken this better course, it is clear that he is not guilty since no one deliberately or consciously chooses

what is bad." This argument is however, fallacious, for it often becomes clear after the event how the action could have been done better though before the event this was far from clear. In many criminal cases counsel for the defendant will argue that since there is so much evidence discovered of the defendant's criminality, he must not have had a criminal intent otherwise why would he have allowed such evidence to surface. Although described as fallacious by Aristotle 2,000 years ago, you will still hear this argument in many criminal courts. It is doubtful that formal analysis of final argument is necessary or even desirable. What is necessary however is a coherent, consistent and persuasive theory or argument.

PRINCIPLE NO. 16 —**ARGUE AS AN EQUAL TO THE FINDER OF FACT**

This rule of argument may be one of the truly fundamental principles of advocacy. Whether arguing to a Municipal Court Judge or the Justices of the United States Supreme Court, or to a jury of sophisticated persons in the Southern District of New York or to a jury in a more rural area, the advocate must achieve an equality of argument. That is to say it is essential to have to ability to speak directly to, not down to

Continued on page 13

Join the NITA Advocates Association!

For Individuals

Member	— \$50 per year
Contributor	— \$100 per year
Fellow	— \$250 per year

For Law Firms

Member	— \$250 per year
Contributor	— \$500 per year
Fellow	— \$1000 per year

Membership will provide:

- * Needed financial support for NITA's activities
- * Scholarship assistance for lawyers to attend NITA programs
- * An invitation to NITA Advanced/Alumni Sessions
- * *The Docket* newsletter
- * An update on new developments in trial advocacy training
- * Priority consideration of sponsored applicants for NITA's National, Regional and Advanced programs
- * Educational material relating to trial advocacy
- * Upon request, a discount on NITA books, videotapes and audiotapes

NITA is a 501(C)(3) non-profit corporation and contributions are tax deductible.

"The Pursuit of Excellence in Advocacy"**Please enroll me in the NITA ADVOCATES ASSOCIATION**

Signature _____

Name _____ Business Address _____

City _____ State _____ Zip _____

Business Phone _____ NITA Session attended _____

Membership: Individual () Law Firm () Member () Contributors () Fellow(s) ()

Membership payment: Payment enclosed () Bill ()

Mail to: NITA, Notre Dame Law School, Notre Dame, Indiana 46556

VIEW continued from page 11

and not up to, the hearer. Books on appellate advocacy make the point that the best advocates are ones who can achieve a firm but conversational tone in their arguments.

The advocate should speak to the jury as an equal discarding both false modesty and condescension. Thirteen people reasoning together create the best atmosphere for success with a jury.

PRINCIPLE NO. 17 —

**BE ALERT TO WHAT IS HAPPENING IN THE CASE AND RE-
ACT IMMEDIATELY**

Although the other principles in this article suggest a number of things that can be done with regard to preparation, no amount of preparation can be a substitute for instantaneous reaction to actual events during a trial. Self-delusion, which clouds the advocate's mind and makes it difficult for him or her to understand whether the case is being won or lost is a major obstacle to successful advocacy. Before you can adjust and deal with the problem, you must see it and understand it.

PRINCIPLE NO. 18 —

**COMMAND ATTENTION AND
COMMUNICATE CONVICTION**

No physical size, shape, voice tone or other ingredient is essential to advocacy. But it is essential that the delivery of the advocate command the attention of the hearer. Cicero touched upon this

aspect in his book on oratory when he said, "As regards delivery, I am sure I need not go into a great deal of detail. The principal relevant factors include physical deportment, gestures of the arms, facial expression, voice production and the avoidance of monotony. How important that last consideration is, we can see from a less serious art — I refer to the stage. For although actors go to great pains to regulate their expressions and their voices and the movements of their body, all the same it is undeniable that there are extremely few whom it is tolerable to go on watching and hearing at any length; and there has never been a time when it was otherwise."⁹

Any advocate who would apply all of these principles in all of his or her trials would quickly amass a successful record. Although some have been simply put, too many of us lose sight of the fact that they must be constantly applied. To read them and to use them is one thing, but consistent success will only come when these principles become an integral part of the advocate's thinking.

FOOTNOTES

1. *The Work of the Advocate*, Elliott, Bobbs- Merrill, p. 59.
2. *The Life of Lord Russell or Killowen*, R. Barry O'Brien, Smith Elder & Co. (1902).

3. *Cicero on the Good Life*, Michael Grant, Penguin Books.

4. There are cases, of course, where the lawyer is required by reason of complexity of the matter to take various positions which are slightly inconsistent. However, the admonition against carrying water on both shoulders has lasted all these years for a reason.

5. *The Work of the Advocate*, Elliott, Bobbs- Merrill.

6. See *The Lawyering Process*, Gary Bellow and Be Moulton, Foundation Press, 1978.

7. *Cicero on the Good Life*, Michael Grant, Penguin Books.

8. *Rhetoric and Poetics of Aristotle*, Modern Library.

9. *Cicero on the Good Life*, Michael Grant, Penguin Books.

ABOUT THE AUTHOR

JAMES J. BROSNAHAN is currently with the firm of Morrison & Foerster in San Francisco. He received his B.S.B.A. degree in 1956 from Boston College and his LL.B. degree from Harvard Law School in 1959. From 1961 to 1966 he was an Assistant U.S. Attorney in Arizona and California where he prosecuted criminal cases ranging from price fixing to murder trials. He is active in American, state and local bar committees; he has served as Chairman of the ABA Section of Litigation's Committee on Trial Practice since 1981. He has lectured and published extensively on subjects dealing with civil and criminal trial work. In addition, Mr. Brosnahan has taught for ten consecutive years at NITA's National Session in Boulder.

IN-HOUSE continued from page 3

The Robins, Zelle In-house Program was held at the Spring Hill Conference Center, outside of Minneapolis. The Center provided a secluded and quiet atmosphere in which the participants and faculty could concentrate on learning and teaching trial skills.



Professor John Sonsteng



Videotaping the In-House



Faculty Donald Beskind and James Steiner

Photo: Chris Kimmeling